No. 11057

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

IMPORTED LIQUORS COMPANY, a Partnership.

Appellant,

vs.

LOS ANGELES LIQUOR COMPANY, INC., a Corporation,

Appellee.

APPELLEE'S REPLY BRIEF.

BEHRSTOCK & RUDNICK,
1127 Bartlett Building, Los Angeles 14,
Attorneys for Appellee.

Parker & Company, Law Printers, Los Angeles. Phone TR. 5206.

TOPICAL INDEX.

PAGE

I.

Statement of case 1

II.

A summary judgment is proper when only a question of law is presented, and the moving party would be entitled to a directed verdict if the case were tried 3

III.

An order for good is merely an offer to buy and is revocable at any time before acceptance or approval is communicated to the offeror 5

IV.

The evidence presented by appellant does not show the formation of a contract 10

A. Communications directly between parties 11

(1) Letter of May 20, 1944, from appellee to appellant 11

(2) Telephone conversation between appellant and Mr. Lilian, president of appellee, on June 5, 1944, and letter of June 5, 1944, from appellant to appellee 11

(3) The purchase order of June 12, 1944 13

(4) The telegram of cancellation of June 14, 1944 14

(5) The letter of June 29, 1944, from appellant to appellee 15

B. Communications between appellant and M. D. Weiner, the agent 15

(1) Weiner's letter to appellant of June 7, 1944 20

(2) Weiner's telegram to appellant of June 7, 1944 20

(3) The purported confirmation of foregoing telegram by appellant 20

(4) Telegram by Weiner to appellant on June 9, 1944 21

Conclusion 22

TABLE OF AUTHORITIES CITED.

CASES.

	PAGE
Baird v. Pratt, 148 Fed. 825	8
Cowan Oil Refining Co. v. Miley Petroleum Co., 112 Cal. App. Supp. 773, 295 Pac. 504	4
Durant-Dort-Carnegie Co. v. Karth, 14 Ohio Cir. Ct. N. S. 341; 33 Ohio Cir. Ct. 343	9
Fox v. Johnson & Winsatt, 127 F. (2d) 729	23
Gardenswartz v. Equitable Life Assur. Soc., 23 Cal. App. (2d) Supp. 745, 68 Pac. (2d) 322	4
Harris v. Miller, 196 Cal. 8, 235 Pac. 981	15
Harvey v. Duffy, et al., 99 Cal. 401, 33 Pac. 897	7
Kerr Glass Mfg. Corp. v. Arden Sales Corp., 61 Cal. App. (2d) 55, 141 Pac. (2d) 938	10
Piantadosi v. Loews, Inc., 137 F. (2d) 534	3
Seward v. Nissen, 2 F. R. D. 545	4
Swanson v. Siem, 124 Cal. App. 519, 12 Pac. (2d) 1053	15
Toms v. Hellman, 115 Cal. App. 74, 1 Pac. (2d) 31	10
Walling v. Fairmont Creamery Co., 139 F. (2d) 318	4

STATUTES.

Civil Code, Sec. 1586	7
Civil Code, Sec. 1682	14
Code of Civil Procedure, Sec. 1870, Subd. 5	15
Federal Rules of Civil Procedure, Rule 56, Subs. (c), (e)	3

TEXTBOOKS.

6 California Jurisprudence, p. 24	10
6 California Jurisprudence, p. 41	10
6 California Jurisprudence, p. 52	7
6 California Jurisprudence, p. 62	10
10 California Jurisprudence, p. 322	15
55 Corpus Juris, p. 81	7
18 Hughes Federal Practice, p. 399	3
9 Ohio Jurisprudence, p. 266	9

No. 11057

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

IMPORTED LIQUORS COMPANY, a Partnership,
Appellant,

vs.

LOS ANGELES LIQUOR COMPANY, INC., a Corporation,
Appellee.

APPELLEE'S REPLY BRIEF.

I.

Statement of Case.

This is an appeal from a judgment entered on an order granting defendant's motion for summary judgment after both parties filed motion for summary judgment. The action is based upon a breach by the buyer of a contract for sale of brandy.

The facts of this case stated briefly are as follows: After preliminary negotiations between the parties, consisting of a letter of May 20, 1944 [Plff's Ex. E; Tr. p. 58], a telephone conversation between appellant and Mr. Lilien, President of appellee corporation [Tr. p. 27] and a letter from appellant to appellee dated June 5, 1944 [Plff's Ex. C; Tr. p. 57], on June 12, 1944, appellee handed an order to appellant's agent M. D. Weiner, together with a deposit check in the sum of $1400.00.

[Plff's Ex. "A"; Tr. p. 54.] The agent told appellee's officer that the order was subject to acceptance by appellant upon receipt of order and check, and transmitted the order and check to appellant, who received it on June 14, 1944. A few hours after receipt of the order appellant received a wire from appellee cancelling the order and asking for a return of the check. After receipt of the order and cancellation, appellant did not communicate with appellee until its letter of June 29, 1945 [Plff's Ex. F; Tr. p. 60], in which appellant demanded that the appellee accept the merchandise.

Appellant admits that M. D. Weiner was its agent, but contends that he was also appellee's agent in the transaction, and thereupon offers into evidence in its deposition, over appellee's objection, communications from M. D. Weiner to appellant, consisting of a letter of June 7, 1944 [Plff's Ex. G; Tr. p. 62] and two telegrams dated June 7, 1944 and June 9, 1944 [Plff's Exs. H and J; Tr. p. 63], the gist of which is to advise appellant that Mr. Weiner had sold appellee 1400 cases of brandy, and that appellee would forward a purchase order and deposit check. Appellant further states that it sent a wire to Mr. Weiner confirming his telegram of June 7th, but neither the original nor a copy of the wire is produced.

Appellant also offered evidence and affidavits concerning damages sustained which are not pertinent to this appeal, because the only specification of error is that the Court erred in granting appellee's motion for summary judgment, and the question of damages is not raised therein.

II.

A Summary Judgment Is Proper When Only a Question of Law Is Presented, and the Moving Party Would Be Entitled to a Directed Verdict if the Case Were Tried.

Appellee has no argument with the law cited in appellant's brief to the effect that a summary judgment is proper only when there is no genuine issue of fact, and when it appears that the moving party would be entitled to a judgment as a matter of law. However, it must be pointed out that the issue of fact must be "genuine" and "material" and must be raised by evidence which would be admissible at the trial; and if reliance is placed upon a written document, sworn or certified copies of the documents must be produced or their absence explained. (*Rule 56, Sub. (c) and (e), Federal Rules of Civil Procedure.*)

Thus it is stated in 18 *Hughes Federal Practice 399:* "Under 56(c) the affidavit must set forth evidentiary facts, not ultimate facts or mere conclusions of law." And in *Piantadosi v. Loews, Inc.* (C. C. A. Cal. 1943), 137 F. (2d) 534, which was an action for infringement of copyright, the Court in affirming the lower Court's summary judgment for plaintiff stated at page 536:

> "Rule 56(e) of the Federal Rules of Civil Procedure, 28 U. S. C. A. following section 723c declares with respect to summary judgments that: 'Supporting and opposing affidavits shall be made on personal knowledge, shall set forth *such facts as would be admissible in evidence* and shall show affirmatively that the affiant is competent to testify to the matters stated therein.' Under this rule mere denials unaccompanied by any facts which would be admissible in evidence at a hearing are not sufficient to raise a genuine issue of fact."

In *Seward v. Nissen,* D. C. Del. 1943, 2 F. R. D. 545, the Court held that on a motion for a summary judgment hearsay statements in affidavits must be disregarded. And in *Walling v. Fairmont Creamery Co.,* 139 F. (2d) 318, the Court states at page 322:

> "When written documents are relied on they must be exhibited in full. The statement of the substance of written instruments or of affiant's interpretation of them or of mere conclusions of law or restatements of allegations of the pleadings are not sufficient."

That same conclusion was reached in *Gardenswartz v. Equitable Life Assur. Soc.,* 23 Cal. App. 2d Supp. 745, 68 Pac. (2d) 322, in passing on the California summary judgment statute which is substantially the same as the Federal Statute; and in *Cowan Oil Refining Co. v. Miley Petroleum Co.,* 112 Cal. App. Supp. 773, 295 Pac. 504, the Court in sustaining a summary judgment and holding that the opposing affidavit was insufficient, stated at page 780:

> "We think the statements quoted are insufficient to defeat the motion for judgment under section 831 D. They are manifestly mere conclusions of law, or, putting the most favorable construction upon them, they are perhaps conclusions of fact or ultimate facts. Neither conclusions of law nor conclusions of fact, nor so-called ultimate facts, are sufficient to satisfy the requirements of this section."

In this connection, the affidavit of Howard Bernon [Tr. p. 69], is so replete with conclusions of law and fact rather than material evidentiary matter, that no weight can possibly be given to it by the Court.

The foregoing are the pertinent rules to be borne in mind in passing upon the documents presented on a motion for summary judgment, and appellee will present his arguments in support of the judgment in this case in the light of those rules.

III.

An Order for Goods Is Merely an Offer to Buy and Is Revocable at Any Time Before Acceptance or Approval Is Communicated to the Offeror.

Paragraph III appellant's complaint [Tr. p. 2], sets forth the transaction between the parties as follows:

> "On June 12, 1944 the defendant by his non-cancellable order, agreed in writing to purchase from the plaintiff *and, by its acceptance of said order the plaintiff sold to the defendant* 1400 cases of Portuguese Suarez Brandy upon the following terms: Shipment to be made F.O.B. Atlantic Port, the defendant to pay for said merchandise upon draft, attached to the bills of lading, at the purchase price of Forty-one Dollars and Fifty-five Cents ($41.55) per case, less reserve for Internal Revenue Taxes and Customs Duty, at the rate of Twenty-seven Dollars and Sixty-three Cents ($27.63) per case, payable by the defendant, or at a net purchase price of Thirteen Dollars and Ninety-two Cents ($13.92) per case. As further consideration in and for said agreement of purchase and sale the defendant issued and delivered to the plaintiff its check in the sum of Fourteen Hundred Dollars ($1400.00) as a deposit thereunder."

Paragraph IV of appellant's complaint alleges the fact that the telegram of cancellation [Plff's Ex. D; Tr. p. 58], was received by appellant on June 14, 1944, and payment was stopped on the deposit check.

Thus appellant's cause of action, according to his own complaint is based upon the purchase order by appellee of June 12, 1944 [Plff's Ex. A; Tr. p. 54], and an acceptance of said order by appellant.

Here it would be well to make two observations: First, the description of the order as "non-cancellable" in the complaint is purely a conclusion of law to be drawn by the Court from the facts, and therefore not properly a part of the pleading. Secondly, if the allegations in the complaint regarding the transactions between the parties were not correct, appellant had plenty of opportunity to amend its complaint, but failed to make any request therefor.

Appellee's answer [Tr. p. 6] admits the order and check and the cancellation thereof, but denies that there was any agreement of sale between the parties.

It is conceded by the appellant [Tr. p. 30] that the first communication by him to appellee after receipt of the order was the letter of June 29, 1944. [Plff's Ex. F; Tr. p. 60.] In this letter he advised appellee that the order had been accepted and demanded that he take the merchandise. This was 15 days after receipt of the order and cancellation.

It should also be noted at this point that both the affidavits of Irven Rose, who placed the order [Tr. pp. 15 and 16] and M. D. Weiner, who took the order [Tr. p. 19], state that Mr. Weiner told Mr. Rose that the order was subject to confirmation by appellant and there is nothing in either the affidavit or deposition of the appellant to indicate that Mr. Weiner was authorized to bind appellant by an acceptance of the order, or if he was, that appellee was ever apprised of that fact.

The question, therefore, is: may a person who places an order for goods revoke that order before acceptance thereof is communicated to him? On that point there is abundant and uniform authority in the affirmative:

In 55 *C. J.* 81 it is stated as follows:

> "An order for goods or chattels until acceptance is merely an offer or proposal to buy, particularly where the order is given to an agent of the seller, and is made subject to the seller's approval or acceptance. It is merely an offer to contract and not a contract to sell or purchase."

Section 1586 of the Civil Code of the State of California states:

> "A proposal may be revoked at any time before its acceptance is communicated to the proposer, but not afterward."

And in 6 *Cal. Jur.* 52 it is stated:

> "Thus an order for goods is merely an offer or proposal to buy, which is revocable at any time before acceptance of it, or before any reply or notice of the receipt or acceptance of the order is given or communicated to the person giving the order."

Harvey v. Duffy, et al., 99 Cal. 401, 33 Pac. 897, a leading case on this subject and widely quoted and approved, is practically on all fours with the instant case. That case was an action for damages for failure to accept goods. Defendant inquired of plaintiff by letter regarding certain radiators. Plaintiff sent their sales representative to defendant, who gave the salesman an order for radiators. Upon receipt of the order plaintiff commenced to manufacture the radiators without advising defendant that they had accepted the order. Two weeks

later defendant wired a cancellation of the order. Plaintiff contended that the salesman had authority to sell and therefore the order became binding when he received it. The Court in affirming a judgment for defendant, and after pointing out that the only knowledge defendant had of the salesman's authority was his authority to quote prices and receive the order for transmission to plaintiff, stated at pages 405-406:

> "But assuming he was authorized to sell, he certainly, so far as the record shows, never exercised any such authority, but simply contented himself with receiving the order and transmitting it to the Company, by whom it was never accepted, nor was anything said or done by it from which an acceptance could be inferred.
>
> "In fact, neither the defendants, nor anyone for them, ever received any reply or notice whatever of the receipt or acceptance of the order either from the Company or Harvey, or anyone else, until after they had revoked it. *As the order was merely an offer or proposal to buy, it was revocable by the defendants at any time before acceptance, and, as there was no acceptance of it by the Company before it was revoked, it follows that there was no contract either of manufacture or of sale.*" (Italics by Appellee.)

In the case of *Baird v. Pratt,* 8th C. C. A. 148 F. 825 the seller brought an action against the buyer on a written order for purchase of goods. The order had been cancelled before acceptance was communicated to the buyer. The salesman who took the order signed his name on the left hand corner, but it was conceded that he had no authority to accept the order and bind the seller. It was contended by the plaintiff that the order was an executory contract for purchase of merchandise. The trial jury held for plaintiff, and the Circuit Court of Appeals

in reversing the judgment held that the order was a mere offer subject to acceptance by the seller and revocable by the buyer at any time before acceptance was communicated to him, and that the lower Court should have given a directed verdict for defendant.

The above law is also followed in the State of Ohio, where appellant resides. In 9 *Ohio Jurisprudence* 266, it is stated:

> "An order or offer to purchase goods subject to approval of the seller does not create a contract until notice of acceptance is communicated."

And in *Durant-Dort-Carnegie Co. v. Karth,* 14 O. Cir. Ct. N. S. 341-33 Oh. Cir. Ct. 343, the Court states:

> "But it is a clear rule of law sustained by abundant authority that an order or offer to purchase goods under a written or printed order is a mere offer, and before notice of acceptance may be revoked by the party making the order or signing the order."

In view of the foregoing it is submitted that appellee was within its rights to cancel the order when it did, and in doing so perpetrated no breach of contract.

But appellant, in his brief and in the testimony presented now contends that appellee's purchase order [Plff's Ex. A; Tr. p. 54], was only a confirmation of a contract which had previously been concluded between the parties, and that therefore the cancellation was of no force and effect. Therefore, bearing in mind the rules concerning the nature of a summary judgment and the rules applicable to evidence submitted on a motion for a summary judgment, appellee will consider all of the evidence produced by appellant to show that this contention of appellant is entirely without merit.

IV.

The Evidence Presented by Appellant Does Not Show the Formation of a Contract.

The law regarding the formation of a contract is almost axiomatic. For the purpose of this argument it is sufficient to say that the simple essentials to the formation of a contract are: proper parties, legal subject matter, consideration, and consent or a meeting of the minds. In 6 *Cal. Jur.* 41 it is stated:

> "Assent of at least two minds *to each and all of the essentials* of the agreement is required; and it is only upon evidence of such assent that the law enforces the terms of a contract or gives a remedy for a breach of it." (Italics ours.)

Consent is manifested by an offer or proposal by one party and an absolute and unqualified acceptance of the terms of the offer by the other. (6 *Cal. Jur.* 62.)

In this connection it is to be noted that while preliminary negotiation may ultimately blossom into a binding contract, yet there is no enforceable contract until the minds of the parties have finally met and there has been an offer and unqualified acceptance at least of all the essential terms and elements of the contract. (6 *Cal. Jur.* 24; *Toms. v. Hellman*, 115 Cal. App. 74 ,1 Pac. (2d) 31; *Kerr Glass Mfg. Corp. v. Arden Sales Corp.*, 61 Cal. App. (2d) 55, 141 Pac. (2d) 938.)

It is the contention of appellee that applying the above rules of law to all of the evidence properly submitted by appellant, it can be said as a matter of law that no contract was ever consummated between the parties to this suit. In arguing this contention appellee will analyze each communication written or oral, testified to or produced by

appellant in chronological order, but will group them in two groups for the sake of convenience. The first group will consist of communications directly between appellant and appellee; and the second group will consist of communications between appellant and M. D. Weiner, the agent.

A. Communications Directly Between Parties.

(1) *Letter of May 20, 1944, From Appellee to Appellant.* [Plff's Ex. E; Tr. p. 58.]

This letter is properly characterized on page 17 of appellant's opening brief as a letter of inquiry solely. It discloses the parties to the transaction and makes an inquiry regarding the subject matter of the transaction.

(2) *Telephone Conversation Between Appellant and Mr. Lilien, President of Appellee, on June 5, 1944* [Tr. *pp. 27, 43, 46*] *and Letter of June 5, 1944, From Appellant to Appellee.* [Plff's Ex. C; Tr. p. 57.]

These two communications will be considered together, because the letter purports to contain a recital of the telephone conversation. It is claimed by appellant (App. Op. Br. pp. 17 and 18) that the telephone conversation concluded in a "verbal agreement" and a "meeting of minds." This is directly contradicted by appellant's own letter of June 5th, which was purportedly written after the conversation and in which he states in the last paragraph thereof, "Please wire me as soon as you know whether or not you desire these 1400 cases Suarez Brandy." How could there possibly have been any meeting of minds when one of the parties didn't even know whether he wanted to enter into any transaction concerning the subject matter ?

However, to resolve any possible doubt in appellant's favor, let us examine every shred of evidence presented by him concerning the above telephone conversation and arrive at its legal effect. That evidence is as follows:

In his deposition appellant testified [Tr. p. 27]:

> "Q. What if anything did you do with reference to that letter? A. Well, first of all I had a long distance telephone call put in to Mr. Aaron Lilien in Los Angeles, in which I discussed this letter. I told him we had a shipment of brandy of which there were originally 1500 cases, of which there was 1400 left available for sale. That it had been passed by the Food and Drug Administration of the United States Government, and, therefore, could meet all the requirements of his letter of May 20th. I further told him that I could send him a photostat of this, and that it would not be necessary for the merchandise to be reexamined in California by any Federal or State authorities that they had. I then, having hung up the 'phone, had a photostat made and wrote him a letter in which I confirmed our telephone conversation."

[Tr. p. 43]:

> "Q. The 8th of June 1944? A. Not only that, when I talked to Lilien on the 5th he asked me to please, not to sell the merchandise to anybody else; to put it aside for him * * *"

[Tr. p. 46]:

> "Q. I mean it is the case in this instance too? A.. No, it was not because I agreed with Lilien on the phone on the morning or afternoon of June 5th to accept his order, and agreed to put aside 1400 cases and not sell it to anybody else."

[Tr. p. 48]:

"Q. Did you issue any instructions to Weiner that any order must be noncancellable and a check deposited, that the company check must accompany the order ? A. All I can remember of the case—I am speaking again from memory now, because I don't have any papers in front of me that would refresh my memory—I remember stating to Lilien on the telephone on June 5th, to send me in a check as evidence of good faith."

In addition to the above testimony the letter of June 5th, 1944 [Plff's Ex. C; Tr. p. 57], is all the evidence by appellant regarding that conversation.

It is immediately evident that not one single word was mentioned between the parties during that conversation, or in the letter, concerning one of the most vital and essential elements of any contract to purchase goods, to-wit: the consideration or price to be paid therefor. The most that can be said for the conversation, giving appellant every benefit of doubt, is that the parties agreed upon the quantity of goods to be involved in the transaction, but that up to this point, there being no mention as yet of the price to be paid for the goods, the entire transaction was still in the process of preliminary negotiation. It is noteworthy that, although a deposit check is mentioned, it does not even appear in what sum the check should be.

(3) *The Purchase Order of June 12, 1944.*
[Plff's Ex. A; Tr. p. 54.]

This is the first document which sets forth all the terms of the proposed contract. It supplies that essential of a contract which was entirely missing in previous communications between the parties, to-wit, the price of the goods.

But, as pointed out in prior arguments in this brief, it constitutes only an offer; and until there has been a communication by the offeree of a consent thereto, it cannot constitute an enforceable contract. Thus, granting, for the sake of argument, that the minds of the parties had previously met upon the parties to the transaction, and the subject matter or goods involved in the transaction, at this point there has not yet been a meeting of minds as to the consideration to be paid. This document could not possibly constitute a confirmation or acceptance, because it contains a condition, the price, which has not hitherto appeared in the negotiations between the parties.

(4) *The Telegram of Cancellation of June 14, 1944.* [Plff's Ex. D; Tr. p. 58.]

This document is a complete cancellation of the offer contained in the Purchase Order above, and was received by the appellant a few hours after receipt of the order and before appellant had even deposited the check which accompanied the order. Appellant concedes that at the time he received this telegram he had not had time to communicate any acceptance of the order to appellee; and as pointed out elsewhere in this brief, an offer may be revoked at any time before acceptance is communicated to the offeror. Therefore, at this point the transaction was lawfully concluded without formation of any contract.

It might be noted that so long as a party has the right to cancel an offer, the reason or lack of reason for the cancellation is entirely immaterial and without legal effect.

Section 1682, *et seq.*, Civil Code of California, cited by appellant, concerns rescission and cancellation of contracts and is not applicable in the face of the contention that no contract was ever entered into.

(5) *The Letter of June 29, 1944, From Appellant to Appellee.* [Plff's Ex. F; Tr. pp. 60-61.]

If not for the cancellation of the order of June 12, 1944, this letter might have constituted an acceptance of the order, if it were held to be within a reasonable time. However, in view of the fact that it was mailed 15 days after receipt of the telegram of cancellation, it cannot possibly have any effect upon the question of whether a contract was created between the parties.

B. Communications Between Appellant and M. D. Weiner, the Agent.

Before proceeding to analyze the communications between appellant and M. D. Weiner, the appellee desires to make the point that these communications, consisting of a letter and several telegrams, are inadmissible against appellee because as to the appellee they are purely hearsay and self serving.

It is a well settled principle of law that a person is not bound by the acts or declarations of another, unless that other is an agent of the person sought to be bound, and that evidence of such acts or omissions are not admissible in evidence unless at least *prima facie* evidence of the agency is first presented.

10 *Cal. Jur.* 322;

California Code of Civil Procedure, Sec. 1870, Subd. 5;

Harris v. Miller, 196 Cal. 8, 235 Pac. 981;

Swanson v. Siem, 124 Cal. App. 519, 12 Pac. (2d) 1053.

The obvious exception to this rule is made in such cases where the person sought to be bound consented, either expressly or impliedly, to the acts or declarations of the other party.

It is submitted that in this case appellant has failed to present any evidence that M. D. Weiner was the agent of appellee or had any authority to bind appellee, or that appellee had any knowledge of any communications between appellant and M. D. Weiner, and that therefore none of those communications would be admissible at any trial of this action; and in accordance with authorities previously cited herein, are not properly to be considered on a motion for summary judgment.

Appellant in his opening brief (p. 17) states that one of the issues in this case was "whether Weiner acted in the transaction on behalf of appellant only or was the agent of both parties." But nowhere in his argument does he point out any evidence of the agency on behalf of appellee or the scope of authority of the purported agent, except the fact that Weiner's letter of June 7th, 1944 [Tr. p. 62] purported to answer appellant's letter of June 5th, 1944 [Tr. p. 57] to appellee. But a glance at Mr. Weiner's letter reveals the following facts:

(a) It is not written on appellee's stationery;

(b) It has a return address different than that of appellee;

(c) It is not signed by Mr. Weiner on behalf of appellee;

(d) The letter itself states the only purpose for which appellant's letter of June 5th was handed to Weiner, to-wit, "to clear with the California Pure Food and Drug Office";

(e) On the lower left hand corner appears the notation that copies of the letter were mailed to a Mr. Martin B. Lane and Mr. J. T. Laird III, but no indication appears that any copy was ever sent to appellee, or that the letter was ever brought to appellee's attention.

Such a letter does not constitute *prima facie* evidence that Mr. Weiner had authority to bind appellee in any manner whatsoever, and certainly not in the purchase of $40,000.00 worth of merchandise.

It must be remembered that Mr. Weiner had a personal interest in this transaction. He stood to earn a commission on it. And it was therefore in his own interest to clear the merchandise with the California authorities.

In the appellant's deposition [Tr. p. 44] appellant seems to base his claim that his own agent [Tr. p. 43] was also the agent of appellee upon the ground that appellee's letter of May 20, 1944 [Plff's Ex. E: Tr. p. 58], was dictated by Mr. Weiner, and stated that Mr. Weiner was familiar with the Portuguese Brandy problem. Although the letter was dictated by Mr. Weiner, it was not signed by him, indicating that he did not even have authority to sign a letter of inquiry on behalf of appellee. Furthermore, the letter is addressed to appellant and where it refers to Mr. Weiner, it refers to him as "your representative." It certainly should not be surprising to appellant that their own California representative in the sale of Portuguese Brandy should be familiar with the Portuguese Brandy problem in California, or the Portuguese Brandy problem of his customers. If he had not made himself familiar with those problems he would be a bad salesman. But obviously the fact that he did know the problems connected

with the sale of the merchandise he handled is no evidence that he is the agent of his customers. It is also obvious that the reason he dictated the letter of May 20th, 1944, was because the Portuguese Brandy problem in California was a complicated one, and he was familiar with it, and for no other reason.

In short, the only force of this letter in connection with the relation of Mr. Weiner to appellee can be stated in the words of appellant himself [Tr. p. 44]: "Why it would indicate that he had some confidence in the man."

The only other testimony concerning the agency of M. D. Weiner to appellee is regarding the so called custom and usage in the trade. [Tr. p. 45.] This question is not touched upon in the argument in appellant's brief, and therefore may be sufficiently answered by the following quotation from 25 C. J. S. 106-107:

> "Proof of usage is admitted *only when the agency has been first shown,* and then not to enlarge the powers of the agent but only to show the extent of the powers actually conferred." (Italics ours.)

It is also well to point out in support of appellee's contention that there is no proof in the record that Mr. Weiner was appellee's agent that:

(a) At no time did Mr. Weiner sign any documents on behalf of appellee;

(b) There is no evidence of any kind that Mr. Weiner ever told appellant that he was an agent of appellee;

(c) There is no evidence of any kind whatsoever that appellee ever told appellant that Mr. Weiner was appellee's agent;

(d) The evidence shows that appellant was paying a commission to Mr. Weiner, but no evidence whatsoever that appellee was paying any compensation of any kind to Mr. Weiner.

(e) The affidavits of Mr. Weiner [Tr. p. 19], of Mr. Lilien, President of appellee [Tr. p. 17], and of Mr. Rose, Vice President of appellee [Tr. p. 15], all deny that any agency relation ever existed between Mr. Weiner and appellee.

Further in connection with this point, there is no evidence of any kind whatever that appellee had any knowledge of any of the communications between the appellant and Mr. Weiner; and Mr. Weiner himself in his affidavit [Tr. p. 20], states that:

> "All communications between this affiant and plaintiff were carried on by affiant as plaintiff's salesman, and without consent or knowledge of defendant."

In view of the foregoing, it is submitted that there is no showing of any kind that Mr. Weiner ever was the agent of appellee; and that, therefore, in accordance with the authorities above quoted, any communications between Mr. Weiner and appellant would be inadmissible at a trial and are therefore improperly taken into consideration on a motion for a summary judgment.

However, at the risk of being superfluous, and only because this is an appeal from a summary judgment, appellee will present his argument on the question of the legal effect of these communications, if any, in event it might be held that they could possibly be admissible.

(1) *Weiner's Letter to Appellant of June 7, 1944.* [Tr. p. 62.]

It is submitted that the only effect of this letter is to advise appellant that their letter of June 5th had been handed to Mr. Weiner for checking with the California authorities, and also to advise appellant that Mr. Weiner was about to send them a wire. No mention is made in this letter regarding the price at which the liquor was to be sold, or whether appellee ever authorized Weiner to send the wire.

(2) *Weiner's Telegram to Appellant of June 7, 1944* [Tr. p. 63]:

Here again there is no mention of any price that the liquor was to be sold for. The telegram does request a confirmation by the appellant to the appellee.

(3) *The Purported Confirmation of Foregoing Telegram by Appellant* [Tr. pp. 28 and 40]:

This evidence is not cognizable by the Court in connection with a motion for summary judgment, for the reason that it purports to present testimony of the contents of a written document in violation of Rule 56(e) of the Federal Rules of Civil Procedure, which rule states that "sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto, or served therewith." Also refer to the quotation from *Walling v. Fairmont Creamery Co.,* 139 Fed. (2d) 318, *supra.*

The only explanation for failure to offer the telegram, or a copy thereof, appears in Mr. Bernon's deposition [Tr. p. 40], as follows:

> "Q. Do you have a copy of that wire? A. No, I haven't got it right now. I also received shipping instructions."

No other explanation for the absence of the written document is given in Mr. Bernon's subsequent affidavit. [Tr. p. 69.]

It might also be noted that Mr. Bernon in his testimony [Tr. p. 40], did not even know whether this telegram was sent to Mr. Weiner in care of appellee or to Mr. Weiner's home. No effort was evidently made to obtain a copy from the telegraph agency which transmitted the wire.

Under the circumstances, it is submitted that the evidence of this communication constitutes no evidence at all; and even if it possibly might have been given some legal effect, it is not properly before the Court and therefore cannot be given any.

(4) *Telegram by Weiner to Appellant on June 9, 1944* [Tr. p. 65]:

In this telegram Mr. Weiner set forth substantially the terms of the purchase order subsequently executed by appellee, and also mentions a letter of May 18th, which indicates he represented the appellant even before the transaction with appellee started. At the end of this telegram Mr. Weiner states:

> "Please confirm by wire or mail and oblige."

It is a significant fact that there is no evidence of any kind, admissible or otherwise, presented by appellant to the effect that he ever answered or confirmed this wire, and it is the only communication that Mr. Weiner ever sent to appellant which sets forth the essential elements of a contract.

It thus appears that not only were these communications between Weiner and appellant not admissible in evidence, and therefore not properly considered by the Court in passing on the motion for a summary judgment. but that they also are of no legal effect in support of any contention that a contract had been executed between the parties to this action.

It should also be noted at the conclusion of this argument, that all evidence of communications between the appellant and Weiner was objected to by Counsel for appellee at the time of the deposition. [Tr. p. 28.]

Conclusion.

Appellee has attempted in this brief to analyze every bit of evidence presented by appellant, in order to show that no contract was ever made between the parties to this action.

Appellee has not attempted to argue the question of damages; for while it is very well established law, requiring no citations, that the question of damages is never settled in a motion for summary judgment, that is especially so in this case, where the appeal is only from the judgment granting appellee's motion for a summary judgment, in which motion and affidavits in support thereof no question is raised regarding the matter of damages.

It is submitted that, giving the appellant the benefit of every doubt to which the evidence properly presented by him might be entitled, the appellee is entitled to a judgment as a matter of law.

In that connection it is well to note that the fact that appellant has himself filed a motion for a summary judgment is an indication by him that he has presented all of the evidence available to him, and that there are no further issues to be raised.

Fox v. Johnson & Winsatt, C. C. A., D. C. 1942, 127 F. (2d) 729.

The action of the District Court of Appeals in granting appellee's motion for a summary judgment thereon should be *Affirmed*.

Respectfully submitted,

BEHRSTOCK & RUDNICK,

By BEN H. RUDNICK,

Attorneys for Appellee.